QUESTION PRESENTED

Whether the retrospective application of a procedural change in the law which has the effect of depriving an inmate of the right to a reversal and a new jury trial amounts to a deprivation of a substantial personal right thereby violating the *Ex Post Facto* Clause, Article I, § 10 of the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT AND AUTHORITIES	6
THE RETROSPECTIVE APPLICATION OF ARTICLE 37.10(B) VIOLATES THE EX POST FACTO CLAUSE OF THE CONSTITUTION	6
ANALYSIS OF THE STATE'S ARGUMENT	14
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
Beazell v. *Ohio*, 269 U.S. 167 (1925)	11, 12, 14-15, 20
Bogany v. *State*, 661 S.W.2d 957 (Tex. Crim. App. 1983)	2, 3, 5, 12, 14, 19
Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798)	6, 7, 15, 17, 18, 20
California v. *Ramos*, 463 U.S. 992 (1983)	19
Dobbert v. *Florida*, 432 U.S. 282 (1977)	5, 7, 8, 9, 11, 14
Duncan v. *Missouri*, 152 U.S. 377 (1894)	8, 10
Evans v. *Thompson*, 881 F.2d 117 (4th Cir. 1989), cert. pending, No. 89-516	9
Ex parte Johnson, 697 S.W.2d 605 (Tex. Crim. App. 1985)	3-4, 14, 19
Ex parte Roper, 61 [Tex.] Cr.R. 68, 134 S.W. 334 (1911)	13-14
Fletcher v *Peck*, 6 Cranch 87 (1810)	7
Hopt v. *Utah*, 110 U.S. 574 (1884)	7, 10
Kring v. *Missouri*, 107 U.S. 221 (1883)	7, 8, 9, 15, 17
Mallett v. *North Carolina*, 181 U.S. 589 (1901)	10-11
Malloy v. *South Carolina*, 237 U.S. 180 (1915)	7, 10
Mapp v. *Ohio*, 367 U.S. 643 (1961)	18
Miller v. *Florida*, 482 U.S. 423 (1987)	*passim*
Mills v. *Rogers*, 457 U.S. 291 (1982)	19
Olmstead v. *United States*, 277 U.S. 438 (1928)	18
Portley v. *Grossman*, 444 U.S. 1311 (1980)	7, 11
Thompson v. *Utah*, 170 U.S. 343 (1897)	8, 9
Weaver v. *Graham*, 450 U.S. 24 (1981)	*passim*
Youngblood v. *Lynaugh*, 882 F.2d 956 (5th Cir. 1989)	1, 4, 14, 15, 16, 18

CONSTITUTIONS, STATUTES AND RULES	
U.S. Const. Art. 1, § 10, cl. 1	2
28 U.S.C. § 1254(1)	2
Texas Constitution, Art. I, § 16	13, 14
Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1985)	*passim*
Tex. Penal Code § 12.42(c) (Vernon Supp. 1979)	2

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, wherein the Respondent was granted relief, is attached to the petition for certiorari as Appendix D.[1] *Youngblood* v. *Lynaugh*, 882 F.2d 956 (5th Cir. 1989). The order of the court of appeals denying the state's suggestion of rehearing en banc is Pet. App. E. The opinion of the federal district court is Pet. App. C. The opinion of the Texas Court of Criminal Appeals denying Respondent's application for a writ of habeas corpus is Pet. App. B. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985) (en banc). The order of the state district court recommending that habeas corpus relief should be granted is Pet. App. A.

JURISDICTION

The State has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. I., § 10 cl. 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law,

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[1] References to appendices attached to the petition are hereinafter referred to as "Pet. App." and followed by the letter associated with the appendix. The appendices attached to the petition are being used in lieu of a joint appendix. References to Petitioner's Brief will be referred to as "Pet. Brief" and followed by the page number. References to the federal record on appeal will be designated as "ROA" and followed by the appropriate page number.

or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1985) provides as follows:

> If the jury assesses punishment in a case and in the verdict assesses both punishment that is authorized by law for the offense and that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

STATEMENT OF THE CASE

On March 17, 1982, Respondent was convicted of Aggravated Sexual Abuse, a first degree felony. During the punishment phase of the trial, the jury found that Respondent had been previously convicted of a felony; hence Respondent's punishment was enhanced and he was sentenced to life in prison and a fine of $10,000. The Twelfth Supreme Judicial District Court of Appeals, in Tyler, Texas, affirmed the conviction on August 13, 1984. Respondent did not appeal the conviction further. It should be noted that the conviction became final before the effective date of Tex. Code Crim. Proc. Ann. art. 37.10(b), which was on June 11, 1985.

On September 19, 1984, Respondent filed an application for a writ of habeas corpus pursuant to a decision by the Texas Court of Criminal Appeals in *Bogany* v. *State*, 661 S.W.2d 957 (Tex. Crim. App. 1983). The Court in *Bogany* held that the enhancement provision of Tex. Penal Code § 12.42(c) (Vernon Supp. 1979) does not authorize the punishment to include a fine in addition to a prison sentence. The Court concluded that the jury's verdict was

"void at its inception" (661 S.W.2d at 959) and the judgment was reversed. In light of *Bogany*, Respondent had a reasonable expectation that his conviction would likewise be reversed. On April 2, 1985, the trial court, in its recommendation to the Court of Criminal Appeals, concluded that relief should be granted. Pet. App. A.

However, after *Bogany* was decided and after the Court of Criminal Appeals granted numerous applications for writs of habeas corpus pursuant to *Bogany*, the Texas Legislature passed Tex. Code Crim. Proc. Ann. art. 37.10(b):

> If the jury assesses punishment in a case and the verdict assesses both punishment that is authorized by law for the offense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

Again the statute went into effect on June 11, 1985.

On October 8, 1985, the Texas Court of Criminal Appeals announced its first decision on the applicability of the changes in art. 37.10(b) in *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), which held that the new statute was merely procedural in nature and could be applied retrospectively. In dissent, Judge Onion expressed the opinion that the retroactive application of the statute deprived Johnson of substantial protection and violated the *Ex Post Facto* Clause.

One week later, on October 16, 1985, the Court of Criminal Appeals denied Respondent's application for writ of habeas corpus, basing its decision on *Ex parte*

Johnson. As in *Johnson*, the Court applied the new statute to Respondent's conviction even though the offense had occurred and the conviction had become final prior to the enactment of the new statute. Pet. App. B-1. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985). The Respondent therefore filed a pro se petition for a writ of habeas corpus with the United States District Court in Tyler, basing his petition on the dissent presented by Judge Onion.

The United States District Court initially issued an order summarily dismissing the application (ROA 51). Respondent then sought and received assistance from Staff Counsel for Inmates. Counsel filed a Motion to Reconsider (ROA 36), and, in the alternative, Notice of Appeal (ROA 29). In response, the Court withdrew its earlier order and ordered a hearing on the merits (ROA 28). The District Court issued its decision on September 13, 1988, denying Respondent's allegation that the retrospective application of Tex. Code Crim. Proc. Ann. art. 37.10(b), by the Texas Court of Criminal Appeals, violates the *Ex Post Facto* Clause of the Constitution. Pet. App. C. Respondent again filed notice of appeal (ROA 7) and requested a certificate of probable cause (ROA 6). In response, Judge Parker issued a certificate of probable cause to the Court of Appeals (ROA 1).

The Court of Appeals for the Fifth Circuit considered the appeal and granted relief on September 8, 1989. Pet. App. D. *Youngblood* v. *Lynaugh*, 882 F.2d 956 (5th Cir. 1989). On October 19, 1989, the Court of Appeals denied the Petitioner's suggestion for rehearing en banc. Pet. App. E. The Supreme Court granted the State's Petition for Writ of Certiorari on December 11, 1989.

SUMMARY OF ARGUMENT

The case law concerning the *Ex Post Facto* Clauses developed by the Supreme Court is extensive. The

Court's test for determining whether a criminal law is *ex post facto* involves two critical elements: "first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" *Miller* v. *Florida*, 482 U.S. 423, 430 (1987), quoting *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981). Additionally, no *ex post facto* violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." *Miller*, 482 U.S. at 430, quoting *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977). However, the "alteration of a substantial personal right . . . is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S. at 29 n.12; *Miller*, 482 U.S. at 433. In the instant case, the Texas Court of Criminal Appeals decided *Bogany, supra*, and numerous inmates were able to utilize the decision to obtain habeas corpus relief. The Texas legislature responded by passing Tex. Code Crim. Proc. Ann. art. 37.10(b) to prevent additional inmates, such as Respondent, from obtaining reversals and new jury trials. In granting relief, the Court of Appeals for the Fifth Circuit applied the Court's test to the facts in this case and concluded that the retrospective application of Tex. Code Crim. Proc. Ann. art. 37.10(b) is *ex post facto*.

In presenting its case, the State of Texas has ignored the Court's test for determining whether a criminal law is *ex post facto*. Instead, the State erroneously argues that the applicability of the Clause has been limited to the four exemplary categories of cases enumerated by Justice Chase in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798). The State has rejected the numerous cases by the Court holding that the retrospective application of procedural changes in the law can be *ex post facto*. Again as recently as 1987, in *Miller* v. *Florida*, the Court held that a change

in a procedural law can fall within the *ex post facto* prohibition if it alters "substantial personal rights."

ARGUMENT AND AUTHORITIES

THE RETROSPECTIVE APPLICATION OF ARTICLE 37.10(b) VIOLATES THE EX POST FACTO CLAUSE OF THE CONSTITUTION

The Supreme Court has regularly considered the issue of whether a criminal law is *ex post facto*. The Court first considered the Constitutional prohibition against *ex post facto* laws in *Calder* v. *Bill*, *supra*. In an oft-quoted opinion, Justice Chase listed exemplary kinds of laws barred by the constitutional provision, including:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and requires less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

3 U.S. at 390. The next sentence in Justice Chase's opinion is not quoted as often, but he adds that the prohibition includes all other similar kinds of laws: "All these, and similar laws, are manifestly unjust and oppressive." He goes on to say that the precise meaning of the prohibition is that the States cannot pass any laws to deprive a citizen of a right given to him by existing laws. 3 U.S. at 394.

There are many reasons why the *Ex Post Facto* Clauses were included in the Constitution. A primary reason was to restrict "governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver*, 450 U.S. at

29. See also *Malloy* v. *South Carolina*, 237 U.S. 180, 183 (1915); *Kring* v. *Missouri*, 107 U.S. 221, 229 (1883); *Fletcher* v. *Peck*, 6 Cranch 87, 138 (1810); *Calder* v. *Bull*, 3 U.S. at 396 (Paterson, J.). The Clauses were likewise aimed at "preventing legislative abuses." *Miller*, 482 U.S. at 423; *Calder* v. *Bull*, 3 U.S. at 396 (Paterson, J.), at 399-400 (Iredell, J.). The Framers of the Constitution also "sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver*, 450 U.S. at 28-29; *Dobbert* v. *Florida*, 432 U.S. 282, 298 (1977); *Kring*, 107 U.S. at 229; *Calder* v. *Bull*, 3 U.S. at 387.

With these principles and purposes in mind, the Court has established its test for determining whether a criminal law is *ex post facto*. Two critical elements must be present: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29; *Miller*, 482 U.S. at 430. The Court has added, however, that the prohibition against *ex post facto* laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended instead to secure "substantial personal rights" from retrospective deprivation. *Miller*, 482 U.S. at 430; *Portley* v. *Grossman*, 444 U.S. 1311, 1312 (1980); *Dobbert*, 432 U.S. at 293.

The issue herein focuses on the extent to which the retrospective application of procedural changes in the law may be *ex post facto*. The Court has held that *ex post facto* violations do occur if the retrospective application of procedural changes in the law alters "substantial personal rights," but do not occur when the law merely changes "modes of procedure which do not affect matters of substance." *Miller*, 482 U.S. at 430; *Dobbert*, 432 U.S. at 293; *Hopt* v. *Utah*, 110 U.S. 574 (1884). Stated differently, to

be *ex post facto*, the totality of the procedural changes must be more onerous than the prior law. *Dobbert*, 432 U.S. at 296-297. Furthermore, the "alteration of a substantial personal right . . . is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S. at 29 n.12; *Miller*, 482 U.S. at 433; *Thompson* v. *Utah*, 170 U.S. 343, 354-355 (1898). Procedural statutes must "leave untouched all the substantial protections with which existing law surrounds the person accused of crime." *Duncan* v. *Missouri*, 152 U.S. 377, 382 (1894). Overall, the Court has consistently held that the retrospective application of procedural changes in the law can in fact be *ex post facto*. The determining factor in these cases is whether an individual is deprived of substantial personal rights.

The Court has issued several opinions that illustrate these principles. In *Kring* v. *Missouri*, 107 U.S. 221 (1883), the defendant had originally been charged with first degree murder but was permitted to plead guilty to second degree murder, which was accepted by both the prosecuting attorney and the court. He subsequently appealed alleging he had been promised a 10 year sentence, rather than a 25 year sentence. The conviction was reversed, and the State responded by seeking and obtaining a conviction for first degree murder. The defendant again appealed claiming that the law in effect at the time of the offense prevented the State from seeking a conviction for first degree murder after having agreed to second degree murder. The State countered by saying that the change in the law was merely procedural and hence the new law controlled. The Court was of the opinion that the new law improperly penalized the defendant for appealing his conviction and proving that his sentence was erroneous. It had the effect of altering the situation of the

defendant to his disadvantage. The Court concluded that the new law, although procedural in nature, was *ex post facto*. 107 U.S. at 235.[2]

In *Thompson* v. *Utah*, 170 U.S. 343 (1898), the Court held that a defendant cannot be retried under a new statute requiring only eight jurors, since the alleged offense was committed and first tried when applicable law guaranteed a trial by a jury of twelve. The Court indicated that statutes regulating procedure will violate the *Ex Post Facto* Clause if they deprive a defendant of a "substantial right given him by the law in force at the time of which his guilt relates." 170 U.S. at 352.

In *Weaver, supra*, the Court once again stated that a law will be *ex post facto* if the law is retrospective and disadvantages the offender affected by it. 450 U.S. at 29. The statute in question changed the formula to reduce the amount of monthly gain-time available to an inmate who complied with prison rules and performed assigned tasks. The petitioner's situation was materially altered and disadvantaged by the reduced opportunity to shorten his sentence through good conduct. In applying the Court's test to the facts, the Court held that the Florida statute was unconstitutional as an *ex post facto* law as applied to the petitioner since his crime was committed before the statute was enacted.

In *Miller, supra*, the Court held that the application of revised sentencing guidelines to a defendant, whose crime occurred before the effective date of the new

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[2] It should be noted that the district court in *Evans* v. *Thompson*, now pending before the Court, No. 89-516, was of the opinion that *Kring* was overruled or modified by *Dobbert* v. *Florida*, 432 U.S. 282 (1977). However, the Court cited *Kring* with approval in a case four years after *Dobbert* in *Weaver* v. *Graham*, 450 U.S. 24, 29 n.12 (1981).

guidelines, was *ex post facto*. The changes in sentencing guidelines were not merely procedural since the application of the new guidelines produced a more onerous sentence than the law in effect at the time of the offense in the defendant's case.

Each of these cases illustrates the basic principles that led to the Court's test as announced in *Weaver* and followed in *Miller*. In each case, a procedural change in the law was applied retrospectively, and the individual affected by the change in the law suffered a deprivation of a substantial personal right given to him by the law in effect at the time of the offense.

The Court has similarly decided numerous cases involving the retrospective application of procedural changes in the law that were not *ex post facto* since the individual affected had not been deprived of a substantial personal right. A statute which merely enlarges the class of persons who may be competent to testify is not *ex post facto*. *Hopt* v. *Utah*, 110 U.S. 574 (1884). The abolition of courts and the creation of new ones, while leaving untouched all the substantive protections which existed at the time of the offense, does not fall within the Constitutional prohibition against *ex post facto* laws. *Duncan* v. *Missouri*, 152 U.S 377 (1894). The defendant therein was not in any way materially disadvantaged by the change in the law. A change in the form of execution from hanging to electrocution is not prohibited. If anything, the change in the law was ameliorative, providing a less painful method of execution. *Malloy* v. *South Carolina*, *supra*. Authorizing the State to appeal a case from an intermediate appellate court to the State Supreme Court did not "dispense with any of those substantial protections with which the existing law surrounds the persons accused of crime." *Mallett*

v. *North Carolina*, 181 U.S. 589, 597 (1901).[3] A statute which provided that co-defendants shall be tried jointly, instead of individually, does not deprive the defendants of any defenses or substantive guarantees provided previously nor change the legal definition of the criminal act, nor the proof required to establish guilt; consequently, the change in law was not *ex post facto*—the defendants were not deprived of any substantial personal rights. *Beazell* v. *Ohio*, 269 U.S. 167 (1925). In *Dobbert*, *supra*, the Court found that a Florida statute which changes the relative roles of the jury and judge in death penalty cases was not *ex post facto* because the defendant could not show that he was deprived of any substantial personal rights. Finally, changes in parole revocation guidelines are not *ex post facto* when they neither deprive a parolee of any preexisting rights nor enhance the punishment imposed. *Portley* v. *Grossman*, 444 U.S. 1311 (1980). In all of these cases, the individuals affected by the changes in the law were not so affected as to suffer a deprivation of substantial personal rights. In some of the cases the individuals speculated that they possibly could suffer harm, but the individuals affected had to unequivocally show that they would be materially harmed in order to obtain relief.

The fundamental question involved in all of these cases focuses on the point at which a change in a procedural law will be sufficient to transgress the constitutional prohibi-

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[3] The United States government relies on *Mallett* for the proposition that the procedural law involved herein is not *ex post facto*. The fact situations, however, are not comparable. The statute in *Mallett* broadened the scope of due process, albeit for the State. The situation herein is just the opposite. The statute eliminated the Respondent's right to due process as it existed at the time of the offense, denying him his right to a reversal and new jury trial.

tion. Justice Stone indicated that the point at which a law will become *ex post facto* "cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Beazell*, 269 U.S. at 171. The determining factor is the point at which an individual is deprived of substantial personal rights.

Keeping these principles in mind, we come to the issue of whether the procedural change in the law here is *ex post facto*. The State concedes that the first prong of the test has been satisfied—the change in art. 37.10(b) has been applied retrospectively. The sole issue then is whether the Respondent has been disadvantaged by the retrospective application of art. 37.10(b). Stated differently, the issue is whether Respondent has been deprived of a substantial personal right. In the instant case, numerous inmates obtained habeas corpus relief pursuant to *Bogany, supra*. Their cases were reversed and remanded for a new jury trial. Respondent had a reasonable expectation that his case would likewise be reversed and that he would have the opportunity for a new jury trial. The trial court agreed that, pursuant to *Bogany*, relief should be granted. Pet. App. A. However, while Respondent's application for writ of habeas corpus was pending in the Court of Criminal Appeals, the Texas legislature changed the law to eliminate the possibility that additional inmates, such as Respondent, could obtain relief. The Court of Criminal Appeals thereafter utilized the new law to deny Respondent's application for a writ of habeas corpus. Instead of obtaining a reversal and new jury trial, Respondent's conviction was affirmed and his sentence modified. For an inmate, the right to a reversal is of paramount importance. Respondent has been appreciably disadvantaged by the retrospective application of the new law.

Regarding the question of whether the deprivation herein was substantial, the Court of Appeals said the following:

> Delineation of the boundary between "substantial" rights and those considered not substantial, like the distinction between fundamental and non-fundamental rights, is an inquiry not susceptible of examination by scientific formulae or comprehensive enumeration. However, given the universal references in *ex post facto* jurisprudence to such concepts as "material disadvantage" and substantial "protection," we are confident that the right to have one's guilt retried before a different jury—with its attendant possibility that the outcome might be different the second time around—is comfortably encompassed within the category of rights considered "substantial."

Pet. App. D-9. The question of whether the deprivation herein was substantial cannot seriously be challenged. As the Court of Appeals correctly concluded, the right herein was "comfortably" encompassed within the category of rights considered substantial. The second prong of the Court's test is satisfied, and the Court of Appeals appropriately granted Respondent's petition for writ of habeas corpus.

The law in Texas, by comparison, also prohibits the retrospective application of procedural changes that deprives a defendant of substantial protection. In the Interpretive Commentary of the applicable Texas provision prohibiting *ex post facto* laws, Article I, Section 16, of the Texas Constitution (Vol. I, pp. 371, 372, Vernon's Constitution of the State of Texas, Annotated) it is written:

> Although ordinarily laws changing procedure are not within the inhibition, still if a procedural change is retroactive and results in depriving the accused of

> substantial protections, it is unconstitutional. *Ex parte Roper*, 61 [Tex] Cr.R. 68, 134 S.W. 334 (1911).

In his dissenting opinion in *Ex parte Johnson*, 697 S.W.2d at 609, Judge Onion, then presiding judge of the Texas Court of Criminal Appeals, stated that Art. 37.10(b) was an "overreaction" to *Bogany*. He added that the provision violates a defendant's basic right to have the jury assess the punishment as part of the verdict. 697 S.W.2d at 612 n.3. Judge Onion concluded that art. 37.10(b), when applied retroactively, undoubtedly violates the prohibition against *ex post facto* legislation.

ANALYSIS OF THE STATE'S ARGUMENT

The State's approach has been to isolate its argument to only one aspect of the Court's decisions, as seen in the Petitioner's emphasis on the following excerpt from *Beazell:*

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, it prohibited as *ex post facto*.

269 U.S. at 169-70, quoted in *Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977). Pet. Brief 9. The State of Texas argues that a criminal law is not *ex post facto* unless it falls within the parameters of this provision.

The Supreme Court has not, however, limited the applicability of the Ex Post Facto Clauses to these areas. Even in *Beazell*, the Court went on to say that "there may be procedural changes which operate to deny to the

accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition." 269 U.S. at 170. As discussed earlier, the Court has decided numerous cases which illustrate Justice Stone's statement and contradict the State's argument.

The State goes on to refer to the four exemplary categories enumerated by Justice Chase in *Calder* v. *Bull* as the "time-honored test" in determining whether a law is *ex post facto*. Pet. Brief 11. The State does not acknowledge the existence of the Court's test as presented in *Weaver* and followed in *Miller*. Perhaps the State is implying that the Court's test is immaterial, or at least incorrect.

In an effort to convince the Court that the standard to be employed is the "time-honored test" of *Calder* v. *Bull*, the State reevaluates past decisions by "pigeon holing" them into one of the four exemplary categories enumerated by Justice Chase. Even then, the State acknowledges that some of the Court's past decisions cannot be harmonized with its theory. Pet. App. 10. The Court of Appeals characterized the State's approach as presenting case law to "erroneously suggest that a statute must fit neatly within the confines of one of these enumerated pigeon holes or else may not rightly be said to violate the *Ex Post Facto* clause." Pet. App. D-7. The State's approach improperly misrepresents the law to unduly limit the value of the *Ex Post Facto* Clauses.

The Supreme Court has regularly been presented with the type of argument presented by the State. It is essentially a variation of the old theme that procedural changes in the law can never be *ex post facto*. In *Kring*, *supra*, the Court provided a response to the State's argument:

> Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed by state legislation, after the offense committed, to the disadvantage of the prisoner, and not held to be *ex post facto*, because it relates to procedure, . . . can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

107 U.S. at 232. Justice Miller's comments are consistent with the Court's numerous decisions holding procedural changes in the law can be *ex post facto*. It is too late in the day for the State's argument to be credible.

The Supreme Court's past decisions on this issue clearly indicate that the value of the *Ex Post Facto* Clauses is broad, rather than narrow. Or, as Judge Gee concluded, the possibility that a retrospective application of a procedural change in the law will be *ex post facto* "constitutes more of a bright spectrum than a bright line." Pet. App. D-10. In other words, the Court has granted relief in a wide array of circumstances involving procedural changes in the law. The State's approach, joined by the federal government, is understandable. Governments by and large do not want limits on their authority; consequently, it is understandable why both the State of Texas and the United States have encouraged the Court to redefine and limit the *Ex Post Facto* Clauses. The decisions of the Court, however, do not support their position. The applicability of the *Ex Post Facto* Clauses regarding procedural changes in the law is somewhat broad.

The State criticizes the Court of Appeals for its failure to consider whether Youngblood was deprived of fair warning by the application of the statute in this case.

Respondent can only speculate as to why the Court of Appeals did not see a need to perform such an analysis. Respondent will, nonetheless, offer one possible explanation. In *Weaver*, the Court announced its test to be used in determining whether a criminal law is *ex post facto*, and the Court stated that the test is derived from the principles that individuals must be given fair warning and that governmental power must be restricted by restraining arbitrary and vindictive legislation. 450 U.S. at 28-29. The Court of Appeals appropriately employed the Court's test. The Court of Appeals neither had a reason nor a right to second guess the validity of the test. There was no reason to examine the facts herein utilizing the principles underlying the test.

Even though the Court of Appeals did not feel compelled to discuss the principles underlying the test, Respondent desires to do so. Respondent particularly wants to examine the fundamental principle that "the *Ex Post Facto* Clauses were included in the Constitution to assure that federal and state legislatures were restrained from enacting arbitrary and vindictive legislation." *Miller*, 482 U.S. at 423, quoting *Calder* v. *Bull*, 3 U.S. at 389. It is clear that the purpose for the enactment of art. 37.10(b) was to arbitrarily prevent additional inmates, such as the Respondent, from obtaining a reversal, new jury trial and possible acquittal. As in *Kring*, 107 U.S. at 235, the State is attempting to penalize Respondent, and all other inmates similarly situated, for proving they have an unauthorized sentence. The State has attempted to downplay the significance of the detrimental impact of the statute on inmates. There are, however, few rights more important to an inmate than the right to a reversal. Furthermore, the action of the legislature seriously undermines the integrity of the judicial and appellate processes.

The State's argument basically stands for the proposition that a legislature may eliminate the effects of unpopular decisions by the appellate courts by enacting new legislation that will eliminate the possibility that additional individuals will obtain relief, label the new legislation as a procedural change in the law, and apply the change retrospectively. The purpose of the *Ex Post Facto* Clauses was precisely to stop the type of activity going on here—to restrain legislatures from enacting arbitrary and vindictive legislation to the detriment of the citizens of the American society.

Judge Garza noted (Pet. App. D-9) he could understand why the legislature thought it distasteful to give convicted criminal defendants a second trial. He indicated that the act of the legislature may be wise public policy; however, wise public policy cannot justify the adoption of *ex post facto* laws. Justice Chase noted that the British government attempted to justify its habit of enacting *ex post facto* laws by saying it was necessary for the "*safety* of the kingdom." 3 U.S. at 389. The Framers of the Constitution did not accept the argument. They believed it was necessary to outlaw this type of legislative activity as a violation of the "vital principles of our *free Republican governments*." 3 U.S. at 388. Maintaining the provisions found in the Constitution is more important than depriving a few convicted criminals a retrial.[4] The government cannot be allowed to enact laws which are *ex post facto* for the sole reason of changing the outcome in a court's opinion.

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[4] The Court has emphasized that the Law must be followed, even if a criminal goes free in the process. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961); *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (dissenting opinion by Justice Brandeis).

The State likewise attacks the conclusion of the Court of Appeals that the Respondent was deprived of a substantial right. The fundamental issue here is whether the right to a new jury trial, after an appellate court has ruled that a reversible error was committed during the initial trial, is a substantial personal right. The crux of the State's argument is that this Court has never held that a defendant is entitled to an entire new jury trial if the punishment assessed by the jury is unauthorized by law. Pet. Brief 16.

The State's argument, however, begs the question. The Texas Court of Criminal Appeals in *Bogany, supra*, concluded that under the laws of the State of Texas the defendant therein was entitled to a new jury trial. The right to a new jury trial exists under the laws of the State of Texas.[5] The Respondent has the same rights and is likewise entitled to a new jury trial.

The States are not obligated to curtail the rights of people to conform to the minimum rights provided by federal law: "It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." *California* v. *Ramos*, 463 U.S. 992, 1014 (1983). When a State creates rights greater than those protected directly by the Federal Constitution, the State created rights are entitled to protection by the federal courts. *Mills* v. *Rogers*, 457 U.S. 291, 300 (1982). It does not matter what rights might have

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[5] The right to a jury trial is of paramount importance in the criminal trial process in Texas. The assessment of the sentence is within the exclusive province of the jury, and the trial judge cannot change the verdict nor refuse to abide by it. See Judge Onion's review of the role of the jury in Texas in *Ex parte Johnson*, 697 S.W.2d 605, 612 n.3 (Tex. Crim. App. 1985).

existed under the law of any other jurisdiction. Respondent is entitled to have his State created rights protected by the federal courts. According to the law in Texas applicable to offenses committed before the change in art. 37.10(b), Respondent has a right to a reversal and a new jury trial. He is entitled to have these rights protected.

We therefore return to the question whether Respondent was deprived of a substantial personal right. The State once again focuses on the categories enumerated in *Calder* v. *Bull*. The State argues that the Court should find that the concept of substantial personal rights is limited to the categories in *Calder*. The State admits, however, that its proposed test is not entirely consistent with the Court's decisions. Pet. Brief 19. The State goes on to say that the proposal should be adopted because it is "easily understood." Pet. Brief 23. In other words, the Court should abandon its prior decisions in order to have an "easily understood" standard. Justice Stone long ago explained there is no simple scheme to artificially determine when the deprivation of an individual's rights is substantial: "[it] cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Beazell*, 269 U.S. at 171. The State's desire to limit the concept of substantial personal rights to the categories found in *Calder* is both simplistic and unrealistic. In this case, depriving Respondent of a reversal and the right to a new jury trial and, instead, affirming his conviction has clearly deprived Respondent of a substantial personal right.

The State criticizes the Court of Appeals for reasoning that the legislature must have thought that the right to a new trial was substantial since the legislature enacted the change in art. 37.10(b) to stop the onslaught of reversals. The State characterized the statement as circular reasoning. Pet. Brief 15-16. The observation of the Court of Appeals nonetheless was apropos. The legislature wanted a different outcome. The legislators thought it was important. It was significant to them. It is likewise significant to Respondent and all other inmates similarly situated. The State is being disingenuous in arguing that Respondent has not been deprived of a substantial right.

The Court of Appeals appropriately granted relief because the Respondent was able to show that (1) the criminal law was applied retrospectively, and (2) that he was disadvantaged by the retrospective application of the new law. Respondent was able to satisfy both prongs of the requirements set forth in *Weaver* and *Miller*, and the Court of Appeals so found. The Respondent was sentenced under a procedure that was not authorized at the time of the commission of the offense. Whereas previously the Respondent, and all others similarly situated, were entitled to a reversal and retrial, the retrospective application of the new statute resulted in a mere modification of his judgment and sentence. The change in procedure materially disadvantaged Respondent by eliminating his right to be sentenced according to the law in existence when the offense was committed. It resulted in eliminating his right to a reversal and retrial by jury and replacing it with an affirmance of his conviction. Respondent lost the substantial personal rights that comes with any retrial and possible acquittal. The retrospective application of art. 37.10(b) is clearly an onerous application of an *ex post facto* change in the law. The constitutional prohibition against *ex post facto* laws undoubtedly applies in this case. The decision of the Court of Appeals accurately applies the Supreme Court's past holdings to the facts in this case. The decision of the Court of Appeals should be affirmed.

CONCLUSION

For these reasons, Respondent respectfully requests that the judgment of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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